

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Labor

Plaintiff filed an action under the Longshore & Workers Compensation Act (LHWCA). The case was settled and plaintiff received payment 2 days past the 10-day due date. Plaintiff then petitioned for a 20% statutory penalty and was granted a supplemental award by the District Director. Plaintiff then filed with the district court, seeking to enforce the supplemental penalty award. Both parties filed motions for summary judgment.

Judge Janice Stewart granted a defense motion for summary judgment. Acknowledging the district court's limited role in reviewing such awards, the court nevertheless held that the supplemental order was not issued in accordance with the law. The court found that the 2-day delay in payment was due solely to the plaintiff's error in supplying a proper address. The employer attempted to deliver the payment within the time limit via Federal Express to the address plaintiff had given and but for plaintiff's error, the award would have been received on time. In such a

circumstance, the court held that the plaintiff should be equitably estopped from seeking a penalty and that allowing recovery of the penalty would be contrary to the purposes of the statute. Accordingly, the court vacated the penalty award. Hanson v. Marine Terminal Corp., CV 99-1070-ST (Findings and Recommendation, June 29, 2000; Adopted by Order of Judge Panner, Aug., 2000).

Plaintiff's Counsel:

Charles Robinowitz

Defense Counsel:

Craig Murphy

Civil Rights

City police submitted an affidavit for a trap and trace device for a company and several residences based upon the belief that the company and its principles were involved in the sale of marijuana grow equipment. The company and individuals instituted an action pursuant to 42 U.S.C. § 1983 claiming that there was insufficient probable cause to support the device application. Plaintiffs claimed that the defendants' actions violated their constitutional rights to privacy, due

process, liberty interests and that they constituted unlawful searches and seizures.

Judge Anna Brown held that a state actor's violation of Oregon statutes relative to trap and trace applications and installations failed to state a § 1983 claim. The court noted that the Oregon statutes were far more restrictive than comparable federal statutes. Judge Brown held that the information gleaned from trap and trace devices is not subject to constitutional protection and that there is no reasonable expectation of privacy in telephone numbers. Trapped phone numbers are neither personal nor inherently sensitive or intimate information and there was no evidence that defendants ever disseminated the information to the public. As for the liberty interest claim, the court found that even if Oregon statutes created a liberty interest, any violation was not subject to federal constitutional protection.

American Agriculture, Inc. v. Shropshire, CV 99-366-BR (Opinion, August 18, 2000).

Plaintiff's Counsel:

Spencer Neal

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Defense Counsel:
Robert Petersen
Jeffrey Rogers

FTCA

Judge Malcolm F. Marsh granted a defense motion for summary judgment and dismissed a Federal Tort Claims Action (FTCA) filed on behalf of the estate of an inmate killed by a fellow inmate at FCI Sheridan. Plaintiff alleged that defendants were negligent in the performance of an investigation following the decedent's reported concerns regarding his cell mate. Defendants sought summary judgment based upon the FTCA's discretionary function exemption.

Judge Marsh held that the facts and allegations fell squarely within the holding of a Seventh Circuit decision. The court followed the Seventh Circuit, expressly finding that the court's holding was consistent with Supreme Court precedent relative to the broad range of discretion afforded prison administrators. Alfrey v. Crabtree, CV 99-63 (Order, August 7, 2000).

Plaintiff's Counsel:

Linda K. Williams

Defense Counsel:

Craig Casey

Employment

A firefighter filed a §1983 action against the city claiming that the defendant failed to promote him to a Lieutenant position in retaliation for complaints plaintiff raised regarding exam questions and a grading system. Defendant moved to dismiss the action on grounds that plaintiff lacked any property interest in a promotion.

Judge Janice Stewart held that plaintiff's allegations that the defendant appointed other candidates ranked lower than plaintiff on the eligibility list in contravention of a long-standing policy and custom of appointing by eligibility ranking was sufficient to state a claim. In addition, the court rejected a defense argument that discretion expressly reserved to the appointing authority should reduce a candidate's aspiration for a promotion to a mere expectancy, thus precluding due process protection. The court found that plaintiff's assertion that the defendant's discretion had been waived by custom and practice was sufficient. Further, the court rejected the defendant's suggestion that a single policy maker is incapable of altering a personnel policy through practice.

Plaintiff also asserted a claim under Oregon's Whistleblower statute. Judge Stewart held that failure to promote can constitute a "disciplinary action" within the

meaning of the statute. The court also held that plaintiff's claim was not subject to a 90 day limitations period since plaintiff elected to proceed under ORS 659.035 which provides a 2-year limitations period. In the alternative, the court found that plaintiff satisfied the 90-day limit by alleging a failure to promote within 90 days of filing. Hovies v. City of Portland, CV 00-432-ST (Opinion, June 5, 2000).

Plaintiff's Counsel:

David J. Hollander

Defense Counsel:

Jenifer Johnston

Job Announcement

Senior District Judge Malcolm F. Marsh is currently accepting applications for a temporary law clerk position. This is a full-time position with an approximate 18 month duration. Applicants should have experience in civil litigation-related research and writing. Send a cover letter, resume, writing sample, at least 2 references, and a law school transcript to:

Kelly A. Zusman

1507 U.S. Courthouse

1000 S.W. Third Ave.

Portland, OR 97204. Closing
deadline: September 29, 2000.